Supreme Court, U.S.
FILED
OCT 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90 - 162

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ROCKFORD MEMORIAL CORPORATION AND SWEDISHAMERICAN CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

THOMAS CAMPBELL
Counsel of Record
L. EDWARD BRYANT, JR.
JAMES W. TEEVANS
GARDNER, CARTON & DOUGLAS
321 North Clark Street
Chicago, Illinois 60610
(312) 644-3000
Counsel for Petitioners

Of Counsel:

DIANE P. WOOD
1111 East 60th Street
Chicago, Illinois 60637

JOHN C. MCCARTHY
TERRY D. ANDERSON
WILLIAMS & McCARTHY
321 West State Street
Rockford, Illinois 61105
Counsel for Rockford Memorial Corporation

BRADLEY T. KOCH
PHILIP R. FRANKFORT
HOLMSTROM & GREEN
800 North Church Street
Rockford, Illinois 61105
Counsel for SwedishAmerican Corporation

October 1, 1990

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

Table of Authorities..... ii

Introduction 1

ARGUMENT 2

I. The Seventh Circuit's Decision Conflicts With The Earlier Fourth Circuit Decision..... 2

A. The Product Market Conflict..... 5

B. The Geographic Market Conflict..... 7

II. The Seventh Circuit's Decision That § 1 and § 7 Are The Same Conflicts With This Court's Prior Decisions. 10

III. The Seventh Circuit's Presumption Of Illegality Conflicts With General Dynamics..... 12

CONCLUSION.....19

TABLE OF AUTHORITIES

PAGE

Cases:

Brown Shoe Co. v. United States, 370 U.S. 294 (1962)..... 5, 6

Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965)..... 11

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961)..... 8, 9

Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369 (9th Cir. 1989)..... 7

United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990)..... 7, 14

United States v. Carilion Health System, 707 F. Supp. 840 (W.D. Va. 1989), aff'd, 892 F.2d 1042 (4th Cir. 1989)..... passim

United States v. General Dynamics Corp., 415 U.S. 486 (1974)..... passim

United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964)..... 11

United States v. Philadelphia National Bank, 374 U.S. 321 (1963)..... 4, 12, 13

PAGE

United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990)..... 7

Statutes and Regulations:

Clayton Act
Section 7, 15 U.S.C. § 18..... passim
Section 11, 15 U.S.C. § 21..... 4

Sherman Act
Section 1, 15 U.S.C. § 1..... passim

H.B. 3587, Ill. 86th Leg., Gen. Sess. (1990)..... 17

Legislative History:

H. Rep. No. 96-871, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Admin. News 2732..... 5

Miscellaneous:

U.S. Dept. of Justice press release no. 88-188, May 25, 1988..... 3

No. 90-162

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ROCKFORD MEMORIAL CORPORATION
and
SWEDISHAMERICAN CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

INTRODUCTION

The government tries to sidestep the conflicts presented by the decision below, arguing:

- that the opposite results in the Rockford and Roanoke cases are only "a conflict in factual findings" (G. Br. at 9);

- that the Seventh Circuit did not "hold" that § 7 of the Clayton Act and § 1 of the Sherman Act are the same today (G. Br. at 7-9); and

- that the Seventh Circuit's treatment of concentration statistics as creating a "presumption of illegality" was not a failure to examine other factors (G. Br. at 11-12).

But despite the fancy footwork, the conflicts exist and need to be resolved. The government does not dispute that the conflicts created by the Seventh Circuit's decision have cast the hospital industry into disarray as to the proper application of antitrust laws to hospital mergers.

I. The Seventh Circuit's Decision Conflicts With The Earlier Fourth Circuit Decision.

On June 1, 1988, the government treated as twins the two actions filed to enjoin the mergers of not-for-profit

hospitals in Roanoke, Virginia[1/] and Rockford, Illinois. The complaints were identical. The rationale for the prosecutions, explained by then Assistant Attorney General Charles F. Rule, was the same:

> The proposed mergers pose significant risks to hospital competition in the Rockford and Roanoke areas. ... In both markets, the number of hospitals will be reduced from three to two. We found no extenuating circumstances that would justify these mergers.[2/]

However, these twin cases reached opposite conclusions on <u>every</u> legal issue:

- whether § 7 of the Clayton Act applies to not-for-profit entities;
- whether the product market for hospital services should include outpatient care;

1/ <u>United States v. Carilion Health System</u>, 707 F. Supp. 840 (W.D. Va 1989), <u>aff'd</u>, 892 F.2d 1042 (4th Cir. 1989).

2/ U.S. Dept. of Justice press release no. 88-188, May 25, 1988.

- whether the geographic market is local or regional;

- whether concentration ratios at some level make a merger presumptively illegal or other economic facts should be examined.

Because the Seventh Circuit held that Clayton Act § 7 did not apply to this transaction and because the government does not contest that holding (G. Br. at 6), the conflict over the application of § 7 of the Clayton Act is not at issue in this case.[3/]

3/ The government is wrong to suggest that the Fourth Circuit erred on the § 7 point, and that the issue is academic because in future cases, when the government remembers to raise the Clayton Act § 11 argument, that section will supply the missing jurisdiction for applying § 7 to not-for-profit mergers. The Court expressly rejected § 11 as a basis for jurisdiction in United States v. Philadelphia National Bank, 374 U.S. 321, 336 n. 11 (1963). See also, Id. at 344-5 n. 22; VHA Br. at 13-16.

The government is also wrong to suggest that the 1980 amendment

(footnote continued)

A. The Product Market Conflict.

In appealing the district court's product market definition, petitioners asked the Seventh Circuit to determine whether the district court's application of the test from Brown Shoe Co. v. United States, 370 U.S. 294 (1962), was correct in light of the district court's extensive factual findings that outpatient care was functionally interchangeable with inpatient care and was increasingly sought when inpatient prices increased. See Ap. a-232 - a-244. The Seventh Circuit never considered whether the facts found by the district court required including outpatient care in the product market under the Brown Shoe test. Rather, it

---

3/ (continued footnote)

extending § 7 to all "persons" includes not-for-profit corporations. G. Br. at 2. H.Rep. No. 96-871, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Admin. News 2732, 2736.

relied on its own intuitive view of interchangeability and the ability of hospitals to discriminate in price. Ap. b-31 - b-34. This approach does not satisfy the requirements of Brown Shoe. If the decision is not reviewed, courts in the future may disregard the requirements of Brown Shoe if they follow this Seventh Circuit approach.

It makes no sense to say the product market determination was factual and therefore not reviewable. Petitioners accept the district court's findings of fact on the competition between inpatient and outpatient care. Their point is that properly applied, the Brown Shoe test requires inclusion of outpatient care in the market. If this issue were never reviewable because it is characterized as fact-based, there would never be an appellate decision informing courts what the legal rule is

for determining a product market and how it should be applied.[4/] This approach conflicts with the result in the Fourth Circuit in the Roanoke case and with the approach in other circuits.[5/]

B. **The Geographic Market Conflict.**

The government does not deny that the district court made a crucial error in its georgraphic market

---

4/ The government is also wrong to suggest that petitioners' expert endorsed the exclusion of outpatient care from the consideration of the product market. Dr. William Lynk testified he had used acute inpatient hospital services in conducting his geographic market analysis because of analytical convenience. He also said it was appropriate to use inpatient care as a product market in some circumstances. However, he expressly pointed out that outpatient competition could not be disregarded. See Tr. 1171-75.

5/ Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369 (9th Cir. 1989); United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990); United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990). See AHA Br. at 11-17.

determination. G. Br. at 10. This error cannot be dismissed as "misapprehend[ing] a single exhibit." Id. The effect of this error was that the district court's geographic market did not meet the requirements of Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961). The fact that the district court's geographic market "was larger than the one proposed by the government and smaller than the one proposed by the defendants" (G. Br. at 5) does not cure the defect.

The Seventh Circuit held that the geographic market was not clearly erroneous even though it was "imperfect." It dismissed defendants proposed market without any analysis of the facts or application of Tampa Electric. The decision eviscerates Tampa Electric.

As the AMA pointed out, the courts below were wrong to assume that hospital

geographic markets are "local in nature, rarely larger than a metropolitan area, and that they will remain that way indefinitely." AMA Br. at 15. The AMA believes "hospital competition is becoming regional in nature." (Id. at 16) and that "patients, third party payers, and physicians [may be] worse off" because of the decisions below. Id. at 5-6.

Had the Seventh Circuit applied the requirements of Tampa Electric to the facts in this record, it would have seen that the Rockford hospitals are already engaged in competition in a region that goes far beyond the district court's market.

The Seventh Circuit's decision does not comport with the requirements of Tampa Electric and conflicts with Roanoke. If this Court does not review this issue, courts in future cases will

be uncertain about the requirements for determining geographic markets.

II. The Seventh Circuit's Decision That § 1 and § 7 Are The Same Conflicts With This Court's Prior Decisions.

The government argues that the Seventh Circuit's "statement" that § 1 and § 7 are the same today is not "necessary" to the court's holding, but mere dictum not appropriate to review. G. Br. at 7, 9-10. This argument concedes the irreconcilable conflict with this Court's prior decision, if that "statement" cannot be depreciated.

The district court concluded that the challenged transaction violated § 7 of the Clayton Act. The district court came to this conclusion (albeit erroneously) based on a market share analysis solely under the "may substantially lessen competition" standard of the Clayton Act § 7. The government did

not prove (or even try to prove) a § 1 case. Tr. 835-36; 745; 818. The government completely failed to meet its burden under the more onerous standard of the Sherman Act § 1.

The court of appeals could not find a violation under § 1 of the Sherman Act, based upon facts below, when the government did not prove a violation of § 1 and the district court expressly did not reach the government's Sherman Act claim. Ap. a-211. The government introduced no facts to show an actual restraint of trade or an actual effect on or injury to competition. The court of appeals necessarily relied on its novel proclamation that this Court's prior decisions in Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965), and United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964), are no longer good law. The

court of appeals' view that the standards for determining the legality of a merger under Clayton Act § 7 and Sherman Act § 1 have converged, permitted it to rely upon a market share analysis which only attempted to prove the less demanding standard of proof.[6/]

III. The Seventh Circuit's Presumption Of Illegality Conflicts With General Dynamics.

The government concedes, as it must, that the Seventh Circuit treated the market share statistics below as presumptively illegal. G. Br. at 8, 11. The government argues that the Seventh Circuit "gave concentration statistics only the presumptive effect that this Court assigned them in Philadelphia

---

6/ Petitioners dispute that this evidence met the § 7 burden of proof, and, in addition, Petitioners maintain, as noted in n. 1 above, that they are not subject to § 7 based on the plain language of the statute.

National Bank." G. Br. at 11. This disregards the fact that this Court has moved away from the presumptive illegality approach of Philadelphia National Bank and that it has no place in a Sherman Act rule of reason case. In United States v. General Dynamics Corp., 415 U.S. 486 (1974), the Court reiterated the importance of viewing a merger functionally, in the context of its particular industry. Id. at 498 (quoting Brown Shoe). Thus, market share statistics do not raise a presumption that must be rebutted; they are the starting point. Id. There must be a "further examination of the particular market - its structure, history and probable future. ..." Id. The government suggests this requirement was "not disregarded" by the Seventh Circuit because it went on to refer to "other factors" which "strenghtened" the

presumption. G. Br. at 12, citing Ap. b-38. But the Seventh Circuit's cavalier discussion of ease of entry and the likelihood of not-for-profits to collude does not meet the requirements of General Dynamics.[7/]

The first dynamic of this industry that should have been considered was the competition provided by outpatient providers. Even if the court accepted market share statistics based on acute inpatient care, the inherent weakness of that market definition should have been taken into account.

Not only was there evidence of extensive competition from outpatient

---

7/ The Seventh Circuit stated that the alleged presumption shifted the burden of proof to petitioners. Ap. b-42. This conflicts with Baker Hughes, supra, which makes it clear that the burden is on the government to prove any injury to competition and that the defendants are not required to prove no injury to competition.

providers at present, the district court recognized this competition was growing more intense. Ap. a-242 - a-244. It is ironic that the district court thought that the fact that outpatient providers could not provide an overnight stay created a bright line between inpatient and outpatient care (Ap. a-50). Illinois is about to premit outpatient facilities to keep patients for up to three nights. H.B. 3587, Ill. 86th Leg., Gen. Sess. (1990). The changing character of this industry is exactly what General Dynamics required the Seventh Circuit to examine but which the Seventh Circuit ignored. The AMA has pointed out that the shift to higher levels of care and more regional competition by hospitals is irreversible. AMA Br. at 15-22. Had the Seventh Circuit considered this factor, it would not have concluded that market share

statistics proved an injury to competition.

The government suggests that the district court made the appropriate inquiry and, among other things, "noted a prior instance of anticompetitive collusion." G. Br. at 6. There was no basis for those findings as was pointed out below. Brief of Appellants (7th Cir. No. 89-1900) at 45-48.[8/] The

---

8/ The district court sought to support its conclusion that the merger would be anticompetitive by labeling certain meetings, shown in documents to have occurred in 1983 and 1984 between the three Rockford hospitals and Blue Cross, as an episode of prior collusion. Ap. a-273 - a-286. However, the government had not claimed that the documents showed prior collusion. The government's economist admitted she had no basis for finding collusion. The defendants did not seek to disprove a proposition never asserted. The Seventh Circuit attached no weight to these findings because it undoubtedly recognized that the district court made one inference from these documents and that that was error given other equally plausible lawful explanations.

Seventh Circuit apparently agreed and clearly placed no reliance on the district court's findings in this regard.

Second, the government is wrong to say the Seventh Circuit "extensively considered" the absence of motive issue. G. Br. at 13. The Seventh Circuit's conclusory treatment of the role of not-for-profit trustees does not meet the requirements of General Dynamics. There was simply no examination of the evidence at trial by the court of appeals. The court of appeals suggested that it was petitioners' burden to prove that "nonprofit suppliers of goods or services are more likely to compete vigorously than profit-making suppliers." Ap. b-41. Of course, this turns the burden around. Actually, the government had the burden of proving that uncompensated trustees would act anticompetitively. This absence of

motive is important if there is to be a plausible economic rationale supporting the merger challenge.

Third, petitioners never argued that the opposition of St. Anthony's - the complaining competitor - conclusively showed the merger was pro-competitive. The failure of the court of appeals to consider this factor merely shows again that the inquiry required by General Dynamics was never made. That the court simply relied on market share statistics is revealed by its observation:

> It is regrettable that antitrust cases are decided on the basis of theoretical guesses as to what particular market-structure characteristics portend for competition, but to place on the government an insuperable burden of proof is not the answer.

Ap. b-42. Petitioners do not seek to place an insuperable burden of proof on the government. They only ask that the government meet its burden under the

antitrust laws. Even assuming that the government could show some increase in concentration in a correctly defined market, that is not enough. The government and the courts below stopped without making the further inquiry required by General Dynamics. If the Seventh Circuit's decision is not reviewed, courts in future cases will treat mergers as presumptively illegal at some level of increased concentration, whether or not that level of concentration shows an injury to competition in the industry in question.

CONCLUSION

The decision of the Seventh Circuit in the Rockford case conflicts with the Fourth Circuit's Roanoke decision, prior decisions of this Court regarding the standards of the Sherman Act and Clayton Act and prior decisions of this Court on market definition. The hospital

industry is particularly affected by the confusion generated by these conflicts. The petition should be granted to resolve these conflicts.

Respectfully submitted,

THOMAS CAMPBELL
Counsel of Record
L. EDWARD BRYANT, JR.
JAMES W. TEEVANS
GARDNER, CARTON & DOUGLAS
321 N. Clark St.
Chicago, IL 60610
(312) 644-3000
Counsel for Petitioners

JOHN D. MCCARTHY
TERRY D. ANDERSON
WILLIAMS & MCCARTHY
321 W. State Street
Rockford, IL 61105
Counsel for Rockford Memorial Corporation

BRADLEY T. KOCH
PHILIP R. FRANKFORT
HOLMSTROM & GREEN
800 N. Church St.
Rockford, IL 61105
Counsel for SwedishAmerican Corporation

Of Counsel:

DIANE P. WOOD
1111 E. 60th Street
Chicago, IL 60637

October 1, 1990